In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 490

UNITED STATES OF AMERICA, APPELLANT

v.

COTTON VALLEY OPERATORS COMMITTEE ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA

REPLY BRIEF FOR THE UNITED STATES

I

APPELLANT ASSERTED IN THE DISTRICT COURT THAT THE APPELLEES FAILED TO SHOW THE GOOD CAUSE REQUIRED BY RULE 34 AND THAT THEIR MOTION SOUGHT PRODUCTION OF DOCUMENTS BEYOND THE LIMITS OF PERMISSIBLE DISCOVERY

Appellees assert that the Government did not raise in the court below the objections that "good cause" for production of documents under Rule 34 had not been shown[1] and that the production sought exceeded the limits of permissible discovery.[2] To the contrary, the Government made,

[1] The Ohio Oil Company brief 8–13; Stanolind Oil Company brief 26–27.

[2] The Ohio Oil Company brief 51–52; Stanolind Oil Company brief 36–37.

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and extensively briefed, these arguments in the court below.

At the hearing on March 11, 1949, at which the district court heard argument upon the motion of The Ohio Oil Company to vacate the order of April 21, 1948, denying its motion for production of documents under Rule 34 (R. 105, 157–159), counsel for the Government, after stating that it insisted upon the privileged character of the documents sought, said "We make that point in addition to the point which was urged in our brief, which was mainly based on the Hickman vs. Taylor case * * *" (R. 157).

The brief referred to was filed on October 12, 1948, in response to The Ohio Oil Company's motion to vacate, and its pertinent sections are set forth in the Appendix (*infra*, pp. 8–15). Subsection A of Point I is headed:

> ***The Written Reports of an Agent or Employee of the Department of Justice to the Attorney General Should Not be Regarded as Subject to the Rules for Discovery, Even Though Such Reports Contain the Agent's Version of an Oral Statement Made to Him by a Person During an Interview***

Under this heading, the brief contends that FBI reports are exempt from discovery as the work product of the lawyer. It states *inter alia:*

> No case has as yet been found where the rules relating to discovery apply to what has been called "the work-product" of a

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lawyer. The defendant in this case by its motion has made more than an ordinary request for relevant non-privileged facts in the possession of the plaintiff's attorney. It has sought discovery as of right of statements of the type described above made to employees of an attorney without showing necessity for the production of the same.

As was said by the Supreme Court in *Hickman* v. *Taylor,* 329 U. S. 495 (p. 509): "We are thus dealing with an attempt to secure the production of written statements and mental impressions contained in the files and the mind of the attorney * * * without any showing of necessity or any indication or claim that denial of such production would unduly prejudice the preparation of petitioner's case or cause him any hardship or injustice."

Subsection B of Point I of the brief is entitled:

> ***The Defendant Has Failed to Show Any Necessity or Any Indication or Claim That the Denial of the Production Sought Will Unduly Prejudice the Preparation of His Case or Cause Him Any Hardship or Injustice***

The brief states:

> The only attempt made by the defendant in this case to justify the production of the records sought in its motion is contained in the affidavit of its attorney J. P. D'Artois attached to its Motion to Produce.

The brief, after describing the contents of that affidavit, continues:

> The Government submits that this is not a showing of good cause or necessity inasmuch as the Government has offered to make all documents in its possession which were obtained from any of the defendants available for inspection and copying. Further, the Government has offered to make available for inspection and copying those documents obtained from other sources which it intends to use as evidence.

This section of the brief concludes:

> The Supreme Court in *Hickman* v. *Taylor, supra,* has laid down the rule that the showing of necessity or cause for the production of oral or written statements of witnesses must be stronger than the ordinary showing of good cause or necessity for the production of documents. No such showing has been made nor is it conceivable that such a showing can be made by the defendant in view of the proposed production by the plaintiff.

The brief therefore made a full and adequate presentation of both the question whether good cause for production had been shown and the question whether the documents sought were outside the scope of permissible discovery. In addition, the opinion in *Hickman* v. *Taylor* discusses both of these issues, and Government coun-

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sel had likewise relied upon that case at the hearing on the same day in arguing at length the Government's objections to interrogatories filed by defendant Magnolia Petroleum Company (R. 107, 117).

II

THE SUPPLEMENTS TO ORDER NO. 3229 OF THE DEPARTMENT OF JUSTICE HAVE NO RELEVANCY

Supplement No. 2, as well as the other supplements or circulars issued by the Department of Justice in connection with Order No. 3229,[3] have no relevancy to this case. The supplement is solely for the private instruction of United States attorneys. It is not a public regulation. Its purpose is to inform United States attorneys of procedure to be followed in the absence of specific instruction from the Attorney General. In no sense does it bind or obligate the Attorney General. In the instant case, the Attorney General has, by affidavit, personally claimed the privilege. Such action makes Supplement No. 2 irrelevant. That supplement does not, by its literal terms or in legal effect, limit the Attorney General's right to appear and claim the privilege against disclosure.

Order No. 3229 (11 F. R. 4920) is the only regulation promulgated by the Department of

[3] These documents are set forth in the appendix to the motion to dismiss or affirm filed by appellee The Ohio Oil Company.

Justice pursuant to R. S. 161 which has been published in the Federal Register, and hence is the only regulation of the Department under that section having legal force and effect. In order to advise his own personnel as to their course of action under that regulation, the Attorney General has from time to time issued certain intra-departmental instructions entitled Supplement No. 1, Supplement No. 2, Circular No. 3259, and Circular No. 3260. These instructions are not public documents, but are limited in their application to Department of Justice personnel. They constitute nothing more than general directions as to the conduct of subordinate employees in the absence of specific contrary instructions by the Attorney General. They are not intended to, nor can they, estop the Attorney General from determining the action which he deems appropriate and in the public interest in a particular case.

Supplement No. 2 is applicable, moreover, only when a *subpoena duces tecum* has been issued at the trial of a cause.[4] It has no application to pretrial discovery procedure. By its terms, it is to be followed only "unless directed to the contrary by the Attorney General." The particular sentence upon which the appellees lay stress—"If

[4] Supplement No. 2, when distributed, was in fact accompanied by a legal memorandum which served to define the meaning of the instructions contained in the supplement.

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questioned, the officer or employee should state that the material is at hand and can be submitted to the court for determination as to its materiality to the case and whether in the best public interests the information should be disclosed"—does not have the inflexible meaning which appellees attribute to it, but merely sets forth the course to be pursued in certain circumstances in the absence of contrary instructions—such as were given here—by the Attorney General. In any event, Supplement No. 2, as we have previously shown, confers no legal right on appellees.

Respectfully submitted.

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Special Assistants to the Attorney General.

APRIL 1950.

APPENDIX

Portion of Government's Brief in District Court Filed October 12, 1948

POINT I

A. THE WRITTEN REPORTS OF AN AGENT OR EMPLOYEE OF THE DEPARTMENT OF JUSTICE TO THE ATTORNEY GENERAL SHOULD NOT BE REGARDED AS SUBJECT TO THE RULES FOR DISCOVERY, EVEN THOUGH SUCH REPORTS CONTAIN THE AGENT'S VERSION OF AN ORAL STATEMENT MADE TO HIM BY A PERSON DURING AN INTERVIEW.

As the head of the Department of Justice, the Attorney General is the chief law officer of the Government, representing it in legal cases to which it may be a party. As such, he occupies exactly the same position in his relationship to the Government as counsel for the defendants in this case do to their clients. Just as counsel for the defendants in this case maintain a law office and are associated with other attorneys and employ investigators, clerks, and others, so does the Attorney General maintain a law office, known as the Department of Justice, and with him are associated other attorneys, clerks, accountants, and investigators. In the class of investigators there is a section of the Attorney General's law office known as the Federal Bureau of Investigation. The employees of this section are generally referred to as FBI agents, and in the performance of their duties, particularly in connection with cases such as this, their work is directed and

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supervised by the Attorney General or one of his assistants.

Usually, as was done in this case, assistants to the Attorney General prepared detailed instructions to the FBI, specifying the nature of the questions to be asked and the type of information in which the attorneys are interested. The FBI is asked to submit to the Attorney General or his assistants reports as to the results of the information secured pursuant to such request. In numerous instances, upon receipt of such reports, an additional detailed request for supplemental investigation is prepared by the attorneys. In many instances, the reports by agents merely set forth their version of what was said by persons interviewed. Almost invariably, Assistants to the Attorney General re-interview persons who were interviewed by the FBI before determination is made whether to use those persons as witnesses at trial, and the reports of interviews by the FBI are used as a guide to the attorneys in determining which persons should be interviewed by them as probable witnesses.

In addition to the questioning of persons pursuant to directives by assistants to the Attorney General, FBI agents are often asked to make examinations of books and records, and in the course of such examination, certain of them are extracted from the files of the persons or corporations and are attached to the reports made by the agent to the Attorney General.

In all of these various duties performed by the agents, they are acting in exactly the same way as the employee of a private law firm acts

in the preparation of a case for trial. The FBI agents are in no sense the agents or employees of a client of the Attorney General, but when working in the capacity above described they are agents of the Attorney General, the attorney for the United States. In the performance of this type of duty the FBI agents act the same as clerks or investigators in private law firms, as distinguished from claim agents or investigators for insurance, railroad or oil companies.

While working in the above described capacity, FBI agents submit reports to the Attorney General or his staff of attorneys concerning the matters investigated by them. These reports become in fact notes of the Attorney General to be put in his private files for his reference in the preparation of the case for litigation.

If reports of the type described under this heading are ever obtainable, it can be only under the most extraordinary circumstances. No case has as yet been found where the rules relating to discovery apply to what has been called "the work-product" of a lawyer. The defendant in this case by its motion has made more than an ordinary request for relevant non-privileged facts in the possession of the plaintiff's attorney. It has sought discovery as of right of statements of the type described above made to employees of an attorney without showing necessity for the production of the same.

As was said by the Supreme Court in *Hickman* v. *Taylor,* 329 U. S. 495 (p. 509):

> We are thus dealing with an attempt to secure the production of written state-

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> ments and mental impressions contained in the files and the mind of the attorney . . . without any showing of necessity or any indication or claim that denial of such production would unduly prejudice the preparation of petitioner's case or cause him any hardship or injustice.

Forcing an attorney or his agent to report or write out what persons have told him and to deliver the account to his adversary gives rise to grave dangers of inaccuracy and untrustworthiness. (*Hickman* v. *Taylor, Supra*) The situation presented in this case is almost identical with that presented in the *Hickman* case where at page 513 the Supreme Court said:

> Petitioner's counsel frankly admits that he wants the oral statements only to help prepare himself to examine witnesses and to make sure that he has overlooked nothing. That is insufficient under the circumstances to permit him an exception to the policy underlying the privacy of Fortenbaugh's professional activities. If there should be a rare situation justifying production of these matters, petitioner's case is not of that type.

In the oral argument heard by this Court on September 17, 1948, counsel for the defendant stated as follows on page 34 of the Official Transcript:

> We've got a right to see their report, and to see their witness and to find out what he expects to say.

Counsel's assertion that he had a right to see the report for the purpose stated is clearly re-

futed by the Supreme Court in *Hickman* v. *Taylor, supra.* In fact, in the concurring opinion of Mr. Justice Jackson, it is further stated (p. 516–517):

> Counsel for the petitioner candidly said on arguent that he wanted this information to help prepare himself to examine witnesses to make sure he overlooked nothing. He bases his claim to it in his brief on the claim that the rules were to do away with the whole situation where a lawsuit developed into "a battle of wits between counsel." But a common law trial is and always should be an adversary proceeding. Discovery was hardly intended to enable a learned profession to perform its functions either without wits or on wits borrowed from the adversary.
>
> The real purpose and the probable effect of the practice ordered by the District Court would be to put trials on a level even lower than a "battle of wits." I can think of no practice more demoralizing to the Bar than to require a lawyer to write out and deliver to his adversary an account of what witnesses have told him. Even if his recollection were perfect, the statement would be his language permeated with his inferences.

So in this case, if discovery were allowed requiring the plaintiff to produce an FBI agent's version of what some person told him, it would undoubtedly be permeated with the inferences of the agent, and as such be valueless. The similarity of the instant case and *Hickman* v. *Taylor, supra,* and the reasons why discovery should not

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be allowed, were pointed out again by Mr. Justice Jackson in the following language (p. 518):

> Having been supplied the names of the witnesses, petitioner's lawyer gives no reason why he cannot interview them himself. If an employee-witness refuses to tell his story, he too may be examined under the rules. He may be compelled on discovery as fully as on the trial to disclose his version of the facts. But that is his own disclosure. It can be used to impeach him if he contradicts it, and such a deposition is not useful to promote an unseemly disagreement between the witness and the counsel in the case.

Here the Government has offered to furnish the defendants with the names of all of the persons to be called as witnesses by the Government. It is inconceivable that this defendant can make a showing or give any reason why he cannot interview these witnesses himself and get their version of the facts as required.

B. THE DEFENDANT HAS FAILED TO SHOW ANY NECESSITY OR ANY INDICATION OR CLAIM THAT THE DENIAL OF THE PRODUCTION SOUGHT WILL UNDULY PREJUDICE THE PREPARATION OF HIS CASE OR CAUSE HIM ANY HARDSHIP OR INJUSTICE

The only attempt made by the defendant in this case to justify the production of the records sought in its motion is contained in the affidavit of its attorney J. P. D'Artois attached to its Motion to Produce. In that affidavit it is stated in substance that certain agents of the Federal Bureau of Investigation approached the Cotton

Valley Operators Committee and upon request were allowed to examine all books, records and other information contained in the files of the Committee relating to operations conducted in connection with the production, processing, and manufacturing of liquid and gaseous hydrocarbons produced from the Cotton Valley Field; that the agents were given full and complete access to all records and information and that they withdrew or made copies of or memoranda of the documents made available to them. With respect to this portion of the affidavit Mr. D'Artois further states that the extent to which records, documents, etc. were withdrawn from the files of Cotton Valley Operators Committee or obtained from other sources are unknown to persons outside the Department of Justice. The Government submits that this is not a showing of good cause or necessity inasmuch as the Government has offered to make all documents in its possession which were obtained from any of the defendants available for inspection and copying. Further, the Government has offered to make available for inspection and copying those documents obtained from other sources which it intends to use as evidence.

The remainder of the affidavit of Mr. D'Artois relates to reports made by the FBI agents to the Attorney General of the United States disclosing in detail the results of their investigations in respect to the methods of operations by the defendants at the Cotton Valley Field. For the reasons set forth under Part A of Point I such reports are not a proper subject of discovery.

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The Supreme Court in *Hickman* v. *Taylor, supra* has laid down the rule that the showing of necessity or cause for the production of oral or written statements of witnesses must be stronger than the ordinary showing of good cause or necessity for the production of documents. No such showing has been made nor is it conceivable that such a showing can be made by the defendant in view of the proposed production by the plaintiff.

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